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IN THE

Supreme Court of the United States

October Term, 1951.

No. 62.

HALCYON LINES AND VINKE AND COMPANY,
Petitioner,

v.

HAENN SHIP CEILING AND REFITTING CORPORATION,
Respondent.

On Writs of Certiorari to the United States Court of Appeals for the Third Circuit.

BRIEF FOR RESPONDENT.

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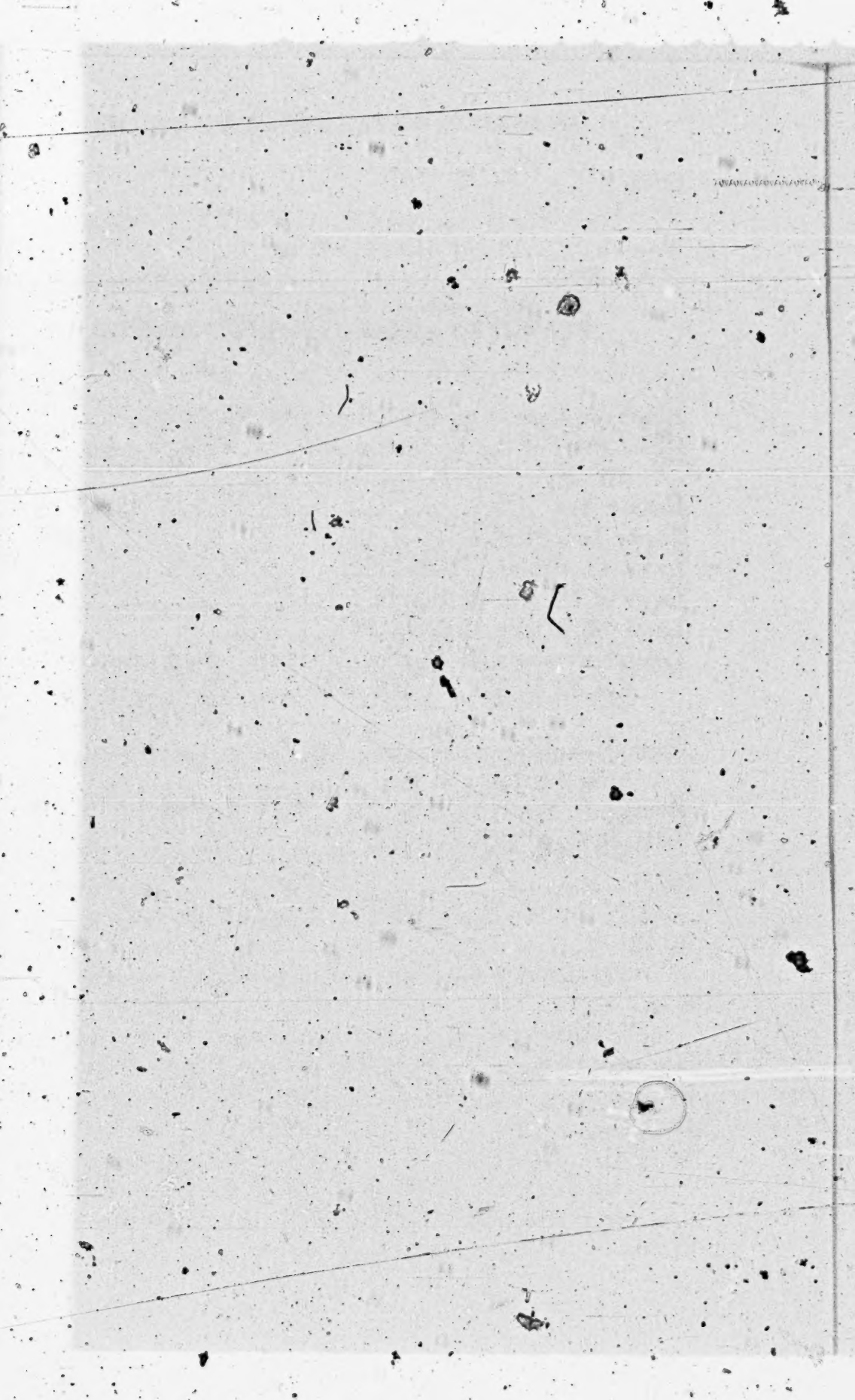

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HALCYON LINES AND VINKE AND COMPANY,
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v.

HAENN SHIP CEILING AND REFITTING CORPORATION,
Respondent.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

BRIEF FOR RESPONDENT.

STATEMENT OF THE CASE.

The Petitioner sought and obtained certiorari from this Court upon two grounds which we will paraphrase as follows:

I. In an action by a longshoreman-carpenter against a shipowner where the plaintiff's employer was joined as a third-party defendant on a claim of contribution, the Court of Appeals erred in allowing contribution to the extent of the compensation which the employer would have had to pay his employee because both were governed by the Longshoremen's & Harbor Workers' Compensation Act, 33 U. S. C. A. 900 et seq.

II. The District Court erred in dividing the plaintiff's damages equally (reversed by the Court of Appeals) and should have apportioned them in accordance with percentages of fault as set by the jury.

The Respondent did not oppose allowance of the writs because of its belief that the problems should be settled by this Court *if this Court reaches those problems.* This Respondent is itself the Petitioner in No. 197.

Both parties have set out statements of the facts and to avoid duplication we respectfully refer the Court to the Statement of Facts and Statement of the Case in our brief as Petitioner in No. 197. So far as the Petitioner's Statement of the Case in the present action, No. 62, is concerned, we have no particular quarrel with it. However, we do not accept Petitioner's (Halcyon's) statement of Respondent's (Haenn's) contentions. We certainly urge points other than those mentioned by Halcyon at page 4, line 3 of its brief as Petitioner in the present action.

Argument.

POINT 1.

For brevity we will refer to the original Plaintiff as Baccile, the original Defendant as Halcyon and the Third-Party Defendant as Haenn. We will take up the points in the order in which Halcyon has raised them.

We presume that one of the reasons which induced this Court to grant certiorari in the present case was the conflict among the circuits which Halcyon pointed out in its Petition for Certiorari. We presume further that if this Court reaches the problem at all, it will consider all possible solutions and choose the best.

There are presently four divergent views expressed as follows:

American Mutual Liability Ins. Co. v. Matthews, 182 F. 2nd 322 (CA 2, 1950);

Hitaffer v. Argonne Co., 183 F. 2nd 811 (CA D. of C., 1950), cert. den. 340 U. S. 852;

United States v. Rothschild International Stevedoring Co., 183 F. 2nd 181 (CA 9, 1950); and

Baccile v. Halcyon Lines v. Haenn Ship Ceiling and Refitting Corporation, 187 F. 2nd 403 (CA 3, 1951), the case now before the Court.

The Court of Appeals for the Second Circuit in the *Matthews* case promulgated the rule that the tortfeasor-shipowner could not recover contribution from the employer governed by the Act because of the exclusive liability provisions of the Longshoremen's and Harbor Workers' Compensation Act, 33 U. S. C. A. 905.*

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* Many other courts have reached the same result. *Liberty Mutual Ins. Co. v. Vallendingham*, 94 F. Supp. 17 (D. C.); *Standard Wholesale Phosphate Etc. v. Ruckert Terminals Corp.*, 65 A. (2) 304 (Maryland Court construing Federal Act); *Johnson v. U. S.*, 79 F. Supp. 448 (D. C. Oregon); *Frusteri v. U. S.*, 76 F. Supp. 667 (D. C. N. Y.); *Miranda v. City of Galveston*, 98 F. Supp. 245 (D. C. Tex.).

In the *Hitaffer* case the Court of Appeals for the District of Columbia appears to have relied upon Second Circuit decisions prior to the *Matthews* case and at least appears to have believed that it was following the Second Circuit when it pronounced its rule that the tortfeasor could obtain contribution from the employer. We will discuss the real as opposed to the apparent holding of those earlier Second Circuit cases later in this brief.

In the *Rothschild* case the Court of Appeals for the Ninth Circuit allowed full indemnity against the employer. No mention is made in the decision of the effect of § 5 of the Compensation Act and no application for a writ of certiorari was made to this Court. We have obtained the Record or "Apostles on Appeal" from the Clerk of the Court of Appeals for the Ninth Circuit. It discloses that the third-party petition filed by the United States was not printed. That makes it difficult to know whether the claim of the United States for indemnity was predicated upon the general maritime law or upon a written contract. There is, however, a clue which may be helpful. In the Opinion filed by Judge Bowen of the United States District Court for the Western District of Washington, Northern Division, it is stated:

> "That as between Rothschild Stevedoring Company and the United States of America, the former was entitled under the *stevedoring contract* to use the ship's winches supplied for the work by the respondent, United States of America; . . ."[1] (emphasis ours)

Printed in the Apostles as *Respondents' Exhibit A-2* is a long contract entitled

> Addendum to WarShipSteve 4/1/44
> Pacific Northwest and Soucal
> Addendum to Contract No. WSA 4-1487
> DA-WSA 4-420

1. Page 268, Apostles on Appeal, *United States of America v. Rothschild International Stevedoring Company*, No. 12,405, United States Court of Appeals for the Ninth Circuit.

The parties to that contract are the United States and Rothschild International Stevedoring Company.[2]

Pertinent portions of the contract provide:

"The Stevedore hereby accepts such engagement and agrees to do and perform all the work required by it to be done or performed under this contract in an economical and efficient manner and in accordance with the best operating practices, to exercise due diligence to protect and safeguard the interests of the Administrator in all respects, and to avoid any delay, loss, or damage whatsoever to the Administrator".[3]

"4. (b) The Stevedore recognizes the relation of trust and confidence established between it and the Administrator by this contract and agrees to furnish its best skill and judgment in planning, supervising and performing the work in the shortest time practicable and to cooperate fully with the Administrator in furthering the latter's interests. The Stevedore further agrees to furnish efficient business administration and superintendence in performing the work".[4]

"8. Liability of Stevedore. While performing the work Stevedore shall, except as provided in Paragraph 9(e) hereof, be responsible for any and all loss, damage or injury (including death, wherever used in this contract) to persons, cargo, vessels, their stores, apparel or equipment, wharves, piers, docks, lighters, barges, scows, elevators, cars, carfloats, or other property or thing, arising through the negligence or fault of the Stevedore, its employees, gear or equipment; . . .".[5]

This would seem to be a contract similar if not identical to the one before this Court in *American Stevedores v.*

2. Apostles, *supra*, page 205.
3. Apostles, *supra*, page 212.
4. Apostles, *supra*, page 226.
5. Apostles, *supra*, page 234.

Porello,[5] 330 U. S. 446. If that be so, then all the Court decided in its *Rothschild* case was the meaning of the contract, a point which this Court specifically left open in the *Porello* case. We have no quarrel with the proposition that parties can, *by express contract*, waive rights or shift the burden of loss due to injury.

The Court in the *Hitaffer* case relied upon *Rich v. United States*.[6] Both were but interlocutory decisions. The *Rich* case seems to have been based upon contract. Whether the contract was express or implied is not clear, but we suggest that it may well have been an express written contract because most if not all War Shipping Administration contracts were written and most if not all contained some indemnification agreement similar to that quoted above from the contract in the *Rothschild* case. Certainly the Court which decided the *Rich* case intended to decide it upon the basis of contract. See *American Mutual Liability Ins. Co. v. Matthews*.[7]

The decision below in our case represents the view of the Third Circuit. It is really the rule originated by the Supreme Court of Pennsylvania in *Maio v. Fahs*[8] and applied to the Pennsylvania Compensation Act.[9] Our research has disclosed no other State which follows this rule.

Our belief that the Third Circuit rule is impractical if not impossible in operation under the Federal Act is predicated upon the differences between the Pennsylvania Act and the Federal Act.

The Pennsylvania Act is elective, the Federal Act is not. In Pennsylvania the Compensation Act limits medical expense to that incurred during the first 90 days after injury or an amount not in excess of $225.00. The Federal Act has no such limitations and in practice medical expense is paid so long as it is necessarily incurred.

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6. 177 F. 2nd 688.
7. 182 F. 2nd 322 at 324.
8. 339 Pa. 180 (1940).
9. 77 Purdons Statutes Annotated 411 et seq.

In Pennsylvania compensation stops after a set number of weeks; 300 weeks in the case of partial disability and 500 weeks in the case of total disability. The Federal Act as now amended, provides for the payment of compensation without limit as to time or amount in all cases of permanent total disability and the only limitation in cases of permanent partial disability is the present monetary limit of $10,000.00. ($11,000 in some cases involving loss of a member.)

In death actions the Pennsylvania Act provides for payment to a widow for 300 weeks. A minor child may collect during minority. Under the Federal Act the widow's right to compensation is terminated only upon her death or remarriage.

The most important practical difference between the two Acts is that under the Pennsylvania Statute in a case of permanent but partial disability, the payment of compensation is suspended during all periods when the injured employee earns an amount as great as that which he had been earning at the time of injury. Under the Federal Act an injured employee who is permanently but partially disabled is entitled to a percentage of disability award which may change from time to time as his condition changes. An injured employee who has sued a third-party and made a recovery presumably did so because he would recover more by that method than he would receive from his employer under the Compensation Act. As soon as his case has been tried and a judgment in his favor has been paid he loses all interest in any claim for compensation. The claim for compensation thereafter becomes one which benefits only the third-party tortfeasor who has paid the judgment in favor of the injured employee. The injured employee is no longer interested in applying to the Deputy Commissioner for periodic re-evaluation of the disability rating and the attendant periodic adjustment upward or downward of the compensation payments. Thus the third-party who has paid the judgment has a legal right only to

collect a small weekly sum and the right is largely controlled by the injured man.

In a death case the right to these weekly payments, so far as the widow would be concerned, would be measured by her lifetime or the period until her remarriage. Life expectancy tables might serve in the one case but there is no practical method of evaluating a widow's chance of remarriage.

We think it is thus plain that the only right that the original defendant obtains under the Third Circuit rule is the right to an unliquidated amount which would be payable weekly. The chances of increasing litigation rather than disposing of it are enhanced where the cause of action by the original defendant is simply broken down into a right to recover piecemeal.

Another important difficulty is the question of whether percentages of partial disability are to be fixed by the Deputy Commissioner to whom the Act relegates that function or whether a Judge in Admiralty or a jury in a civil case are to be called upon to evaluate the percentage of the injured employee's future disability in order that the original defendant may recoup a part of his loss from the employer or its compensation insurance carrier. We suggest that it would do violence to the scheme of the Compensation Act to relegate this function to a Court or a jury. Yet there is no way that the Court can force a determination by the Deputy Commissioner and even if it could, the Deputy Commissioner's opinion might well be held to be nothing more than advisory.

Looked at from another standpoint, all that the Third Circuit rule does is to deprive the employer of the right of subrogation which is granted him by § 33 of the Federal Act, 33 U. S. C. A. 933.

It is for these reasons that we suggest that the result reached by the Court below in the case at bar may seem to be equitable upon its face but is completely incapable of operation in practice.

This analysis of the four rules leads inevitably to the conclusion that from a practical as well as a legal point of view the result of the *Matthews* case has much to recommend it.

Our analysis of the four rules leads us to conclude that the result reached by the Court of Appeals in the *Matthews* case is proper both from the point of view of the practical enforcement and statutory interpretation of the Longshoremen's & Harbor Workers' Compensation Act. We will proceed to demonstrate the reasons for this conclusion.

The Clear and Explicit Wording of the Longshoremen's and Harbor Workers' Compensation Act Is Prima Facie Evidence of the Intent of Congress. § 5 of This Act Was Intended by the Congress to Make the Employer's Liability to Pay Compensation an Absolutely Exclusive Liability.

We start with the fundamental proposition that the clear wording of any Act of Congress is prima facie evidence of the intent of Congress in drafting and passing the Act in question. Hence the wording of the Act is sufficient to establish the intent of Congress, unless persuasively rebutted by evidence of a different or varying intent.

The plain fact is, that in all of the litigation and decisions involving the question of exclusiveness of remedy provided in § 5 of the Act, there has never been a shred of evidence produced tending to show that the Congress intended anything at variance with the plain and clear wording of this section of the Act. The Act became law on March 4, 1927. It was one of numerous Acts of so-called "social legislation", both State and Federal, which class of legislation had its inception several years after the turn of the century. It was then that numerous States enacted Workmen's Compensation Acts.

The case at bar necessarily and fundamentally involves the question of whether Congress intended § 5 of the Act

to provide a limited exclusive liability of the employer only as to the employee, or anybody "standing in his shoes" as a claimant, or whether it means exactly what it says in providing that the employer's statutory liability "shall be exclusive and in place of all other liability of such employer to . . . anyone otherwise entitled to recover damages from such employer, at law or in admiralty, on account of such injury or death . . . .". If the exclusive provision as to "all other liability of such employer to . . . anyone otherwise entitled to recover damages" from him does not preclude a claim by a third party for contribution or indemnity, there must be a showing of legislative intent that such claim is not precluded by the Act. There never has been, and, we respectfully submit, there cannot be any such showing of legislative intent. The plain fact is that the Congress never contemplated, and therefore had no intent in either direction regarding such a third party claim prior to the passage of the Act. The Congress simply intended that the liability of the employer provided in the Act should be absolutely exclusive, and so expressed itself in § 5 of the Act. Otherwise there would be some reference in the record of Congressional proceedings prior to the passage of the Act showing that the Congress was aware of the possibility of such a claim against the employer by a third party, and that such possibility had been taken into consideration. There is none.

The apparent failure of the Congress to consider the possibility of a claim by a negligent third party against an employer subject to the Act, upon the basis of contribution or indemnity, is less surprising than it otherwise might be, if the history of litigation on this subject is carefully examined. It is apparent that, subsequent to March 4, 1927, when the Act became law, the exclusiveness of the employer's liability provided by the Statute was recognized and accepted for a period of twelve years. The earliest reported decision in a litigated case subsequent to 1927 appears to have been the opinion of Judge Peters of the

United States District Court for the District of Maine, Southern Division, on February 14, 1939, in *Erline H. Samuelson Rederii v. Jarka Corporation*, 26 F. Supp. 304. In overruling exceptions to a Libel filed by a shipowner against a stevedore employer for indemnity or contribution, the shipowner having been held liable for damages and costs in a separate action brought by a longshoreman, Judge Peters made the following statement at Page 305, after quoting pertinent parts of § 5 on the subject of exclusiveness of liability:

> "The respondent contends that by the terms of the Act its liability for damages on account of an injury is limited to a person proceeding under the Act, and that as this libel is an action for or on account of the injury it cannot be sustained for that reason.
>
> "The language of the Act is not appropriate to the meaning respondent argues for. The liability excluded by the language is other liability of the employer to the employee, or anyone standing in his shoes, for damages 'on account of such injuries'."

The foregoing statement by Judge Peters was made without any citation of supporting authority, and without proof of any evidence of intent on the part of the Congress to so limit the general expression of exclusiveness of liability. It can hardly be said that the foregoing opinion "started the ball rolling". If it did so, the start was a very slow one, since the next reported opinion of importance on the subject appears to have been *The Tampico*, 45 F. Supp. 174 (D. C. W. D. N. Y. 1942). This also appears to have been the first case in which there was a citation of highest authority in support of a decision allowing contribution from a stevedore employer in favor of a shipowner for one-half the amount of the libellant-employee's full damages decreed against the shipowner. The authority cited was *Aktieselskabet Cuzco v. The Sucarseco, et al.*, 294

U. S. 394. This case held that in a case of collision between two vessels where both vessels are at fault, while damages are divided between the two vessels, an innocent cargo owner can recover full damags from the noncarrying vessel. It further held that both vessels in collision being at fault, upon a division of damages between the two vessels, the noncarrying vessel can recoup from the carrying vessel one-half of the damages paid to the owner of the cargo on the carrying vessel, notwithstanding the fact that the Harter Act relieves the carrying vessel from liability to her own cargo resulting "from faults or errors in navigation or in the management of the vessel". It is believed that *The Tampico, supra,* is the first decision involving a claim for contribution or indemnity by a negligent third party against a stevedore employer, in which analogy was drawn to the collision cases in which the possible immunity of an owner of a carrying ship from any liability to its cargo in a case of mutual fault collision under the provisions of the Harter Act was considered, and rejected. It was not until 1947, five years after the decision in *The Tampico, supra,* that another decision of importance along similar lines [10] was reported, in *The S. S. Samovar,* 72 F. Supp. 574 (D. C. N. D. Cal.), holding that the builder, and the owner pro hac vice of the vessel were entitled to contribution from the negligent employer of the libellant-longshoreman "by well established rules of maritime law". In support of this holding the Court, at P. 588, cited four authorities: *The Sucarseco, supra; Erie R. R. Co. v. Erie Transp. Co.,* 204 U. S. 220, 225 (1907); *The Chattahooche,* 173 U. S. 540 (1899); *Briggs v. Day,* 21 Fed. 727, 730 (S. D. N. Y. 1884). All four of these authorities were collision cases, and except for the last, involved a consideration of the immunity provisions of the Harter Act. Thus it is obvious that

10. We do not include *American Stevedores v. Porello,* decided March 10, 1947, 330 U. S. 446, in this classification because the case involved a *contract* of indemnity. We believe that *Barbarino v. Stanhope S. S. Co.,* 151 F. 2(d) 553, (2 C. C. A., 1945) and *Cataldo v. A/S Glittre,* 41 F. Supp. 555 (E. D. N. Y. 1941) have little or no authoritative value here.

twenty years after the enactment of the Longshoremen's and Harbor Workers' Compensation Act, the collision cases were the only higher authority that could be found to support claims for contribution against a stevedore employer, whereas no evidence of the intent of the Congress otherwise than as expressed in the clear wording of § 5 of the Longshoremen's and Harbor Workers' Compensation Act had been produced.

Analysis of the Purpose, Scope and Intent of the Harter Act as Compared With the Same Elements of the Longshoremen's and Harbor Workers' Compensation Act Fails to Justify the Analogy to the Collision Cases Involving the Former Act, as Practically the Sole Authority for Limiting the Manifest Intent of Congress in the Latter Act to Provide an Absolutely Exclusive Liability on the Part of an Employer of Longshoremen and Harbor Workers.

The title of the Harter Act reads as follows: "An Act relating to navigation of vessels, bills of lading, and to certain obligations, duties, and rights in connection with the carriage of property."

The purpose of the Harter Act is well expressed in *The Willdomino* (C. C. A. N. J. 1924), 300 F. 5, certiorari dismissed (1926) 46 S. Ct. 205, 270 U. S. 641, as follows:

> "To meet the ever increasing attempts further to limit the liability of the vessel and her owners by inserting in bills of lading stipulations against losses arising from unseaworthiness, bad stowage, negligence, and other causes of liability by which the common law responsibility of carriers by sea was being frittered away, the Harter Act (27 Stat. 445 [this section and sections 191 to 195 of this title]) was passed. It was designed to fix the relations between the cargo and the vessel and to prohibit contracts restricting the liability of the vessel in certain particulars."

Section 3 of the Act entitled "Limitation of liability for errors of navigation, dangers of the sea, and acts of God" provides, briefly, that if a vessel owner transporting cargo to or from any port in the United States "shall exercise due diligence to make the said vessel in all respects seaworthy and properly manned, equipped, and supplied", neither the vessel nor her owners or their representatives shall become or be held liable for damage or loss resulting from faults or errors in navigation or in the management of the said vessel, or resulting from various other enumerated causes not pertinent here. Section 3 of the Act contains no expression indicating that the intent of the Congress was to make the relief from responsibility for damage or loss provided by the Act, absolutely exclusive of all claims other than claims made by the cargo owner. Of course the Harter Act did not relieve from all liabilities, but only from liability resulting from the enumerated causes.

The only active burden imposed by the Harter Act upon the shipowner in exchange for his benefit of limitation of liability provided in § 3 of the Act, was a duty to use due diligence to make his ship "in all respects seaworthy, and properly manned, equipped, and supplied". This was a light burden indeed, when it is considered that as a matter of self-interest a shipowner should use such diligence as an incident of the proper conduct of his business. As aptly stated in his concurring opinion by Chief Circuit Judge Learned Hand in *American Mutual Liability Ins. Co. v. Matthews et al.*, 182 F. (2d) 322, 326 (2nd C. A., 1950):

> "And while, as I have said, § 3 did make it a condition upon the release that due diligence should be used to make the ship seaworthy even in respects not relevant to the carriage, in practice that has not added a heavy burden."

The Longshoremen's and Harbor Workers' Compensation Act, on the other hand, was an act of social legislation

with deep humanitarian implications as expressed in *South Chicago Coal & Dock Co. et al. v. Bassett,* 104 F. (2d) 522, 526 (affirmed 309 U. S. 251) as follows:

> "The number of jurisdictional issues should not be increased beyond legal reason because the purpose of the Act was to expedite the hearing of claims and granting of awards and to simplify as greatly as possible the procedure in such matters, so that the needy, the helpless, and the ignorant would receive financial aid promptly."

The burden which the employer assumed under the Longshoremen's Act in comparison to the benefit derived is vastly greater than the burden assumed by the shipowner under the Harter Act. In fact the Harter Act merely grants the shipowner a privilege upon his compliance with a condition, whereas an employer who fails to undertake the heavy financial burden of securing compensation under the Longshoremen's Act is subject to an action in law or in admiralty in which action he is deprived of his defenses of fellow servant negligence, assumption of risk, and contributory negligence. On the other hand, if he secures payment of compensation, he becomes subject to a general liability to pay compensation limited only by the terms of the Act, regardless of fault or negligence upon his part. As a matter of quid pro quo, the condition, as a price of privilege, imposed in the Harter Act is not comparable to the burden and partial relief imposed in the Longshoremen's Act. Therefore, the by-passing of the clear provision for exclusive liability of the employer in § 5 of the Longshoremen's Act is not justified upon the basis of the collision cases, *supra,* involving the Harter Act.

The Only Satisfactory Solution of the Dilemma Presented by the Conflicting Decisions, Without Violating the Manifest Intent of the Congress as Expressed in § 5 of the Longshoremen's Act, Lies in Upholding the Absolutely Exclusive Provisions of § 5 of Said Act, in Accordance With the Decision in American Mutual Liability Ins. Co. v. Matthews, 182 F. (2d) 322 (C. C. A. 2d, 1950).

We suggest that it is noteworthy that the conflict on the question did not reach fruition until twenty-four years after passage of the Federal Act. There is not this great confusion with respect to the State Acts. Except for Pennsylvania and New York, where the contract rule is applied, all States seem to grant this exclusive liability. This fact plus the years of operation under the concept of exclusiveness seem to lend weight to our view that the Matthews result has the advantage of being practical.

It also avoids the conflict among §§ 5, 14 and 33 of the Federal Act. Section 14 requires payment of compensation promptly and without an award. Under § 33 an employer who compels his employee to obtain an award for compensation before the Deputy Commissioner can obtain control of the litigation against the third party because the right of action is assigned to the employer by operation of law. The inevitable result is conflict between the prompt payment of compensation and the natural desire of the employer to protect himself by compelling the employee to obtain an award. The employer's self interest is not fanciful, as is illustrated in the case at bar. If Baccile had been compelled to obtain compensation under an award, his employer could have sued or not, as it chose, and could have settled for an amount sufficient only to cover the employer's expenses and future compensation liability.

To say that insurance is the complete answer to this question ignores reality. All liability insurance policies (in which high limit coverage can be purchased) with which we are familiar exclude from coverage a claim by an em-

ployee. The standard policies of Workmen's Compensation insurance are not intended to cover this liability and, if they have any coverage at all outside the Act, it is only some low limit coverage intended to apply in cases of illegal employment.

Thus we can see every practical reason why the status quo should be maintained. That it is practical has been demonstrated. It certainly avoids a strained interpretation of § 5 and is certainly in accord with the wording of the pertinent sections of the Act. We suggest that judicial legislation such as was attempted by the Circuit Court in our case can lead only to chaos. If the scheme of things is to be changed, Congress should legislate. Piece by piece judicial legislation cannot solve the problem satisfactorily.

POINT 2.

The Maritime Rule of Contribution Is Equal Division of Damages Where Contribution Is the Remedy.

We have already pointed out that in our view the present point need not and should not be reached. We urge (in No. 197) that Halcyon has not made out any case for contribution because it was primarily liable and Haenn's liability was but secondary. If we are wrong in that, we have argued that the Compensation Act should be a complete defense. As a backstop, and as an answer to what we view as an unsound legal argument, we urge that under the Maritime Law, contribution is enforced by dividing damages and not by apportioning them.

This point presents a novel problem in that Halcyon is urging the Court to pronounce the rule that in a suit for contribution between tort feasors, damages shall be based upon comparative fault. We assume only arguendo that Haenn is a tort feasor in the same class as Halcyon.

As we will hereinafter demonstrate, only once before in the long history of contribution under maritime law has such a result actually been reached. *Portel v. United States*, 85 F. Supp. 458. As we will attempt to show, in that case

the Court failed to analyze language properly and took words out of context to arrive at a result which today stands as the only case where such a result has been reached. A reading of the opinion makes it plain to us that although the Judge in the *Portel* case believed that he was applying a rule recognized by the maritime law he was really acting upon a misinterpretation of the authorities.

The main thrust of our argument will seek to establish that it is no longer open to the Courts to change the rule of the maritime law of contribution between tort feasors from division of damage to apportionment of damage. We say this because the United States has consistently refused to adopt the Brussels Convention of 1910. That refusal establishes a legislative policy as strong as a positive enactment on the subject. Whatever arguments can be made concerning the fact that more equitable results may be achieved under a system of apportionment, that is an argument which is properly addressed to Congress and not to the Courts. We therefore agree with Judge Learned Hand, dissenting in *National Bulk Carriers Inc. v. United States* [11] when he says that Courts should apply the doctrine unflinchingly. We will develop all of the phases of these arguments more fully later in this brief.

Historical Background.

Halcyon's argument is that in maritime law, the doctrine of equal division of damages between tort feasors obtains or should obtain only in cases of collision between vessels. Halcyon apparently does not admit that damages caused by collision are only one phase of the field of maritime tort and that no sound argument has been advanced why uniformity should not prevail within the field of maritime tort. This is by no means inconsistent with our earlier argument that there is an altogether different *quid pro quo* between the Harter Act as it effects collision litiga-

11. 183 F. (2) 405, 410—quoted by Petitioner commencing at Page 17 of its brief.

tion and the Longshoremen's and Harbor Workers' Compensation Act as it effects injury claims.

Halcyon does not suggest *why* a different rule should obtain in a personal injury suit. We will attempt to demonstrate that historically the division of damage rule of the American Maritime Law is not only *the* rule, but is a sound rule. If it is to be changed then much other maritime law should be changed to accommodate. That is a legislative and not a judicial problem.

Historical background is sometimes used by Courts as a basis for rationalization. Article 14 of the Laws of Oleron provided that in cases of collision, except where fault was intentional, "the whole damage shall be in common, be equally divided and appraised half by half". To the same effect were the Laws of Bruges (1350-1380) and the Black Book of the English Admiralty, Volume 4, page 321. Article 26 of the Laws of Wisby provided that in cases of collision, "the two ships shall jointly stand to the loss".

The leading article on the subject of divided damages is by George C. Sprague, 6 N. Y. U. Law Review 15. Sprague notes the fact that in the English reports the question of divided damages is mentioned most frequently in reference to collision litigation and accounts for this by reason of the fact that in those old days personal injury cases must have been rare indeed. For one reason the mariners all had an interest in the voyage if they were not joint owners of the ship. They loaded and unloaded the cargo themselves without machinery which in the present day is a frequent cause of accidental injury. Thus collision and to a lesser extent claims for loss or damage to cargo comprised the bulk of the litigation in the field of maritime tort.

Sprague concludes that the rule is that, as between two tort feasors, the damages of the innocent third party are divided equally. Sprague's conclusion that uniformity is highly desirable in all cases under the maritime law goes far to answer Halcyon's argument that the division of dam-

age rule applies in collision cases but apportionment of damage should apply in cases of personal injury. If uniformity is desirable, it is desirable throughout the field of maritime tort, not merely in one segment of it. Cf. *Garrett v. Moore-McCormack Lines, Inc.*, 317 U. S. 239.

Halcyon's Argument That Equal Division of Damages Obtains Only in Cases of Collision Is Not Well Founded.

Halcyon carefully restricts its statement of the question raised by it. It admits (brief, page 17) that the rule of equal division applies in cases of collision. It would probably concede that if the litigation sought recovery for damage or loss of cargo and the plaintiff was an innocent third party to whom loss had been caused by joint tort, the loss should be equally divided.

Certainly that is the law under such decisions as *Aktiselskabet Cuzco v. The Sucarseco*, 294 U. S. 394, and *The Chattahoochee*, 173 U. S. 540.

Halcyon fails to make the distinction between contribution as between the two tort feasors and the rule of apportionment of damages which is applied as between plaintiff and defendant or libellant and respondent *where both have contributed to the plaintiff's loss.* Apportionment as between plaintiff and defendant has been one of the attributes of which Admiralty has long been proud. Admiralty early rejected the common law concept of contributory negligence as a bar to recovery. Congress in enacting the Jones Act, 46 U. S. C. A. 688, has applied the rule of comparative fault in suits between an employee as plaintiff and an employer as defendant. Congress has never gone further than that and applied any rule of apportionment as between two tort feasors both liable to a plaintiff. As we said earlier, Congress, by refusing to accept the Brussels Convention, has consistently refused to adopt a policy of apportionment as between tort feasors.

In *American Stevedores Inc. v. Porello*, 330 U. S. 446, this Court had before it a case where the issue to be de-

cided was the contribution between tort feasors whose actions had combined to cause injury to a third party. There was a *contract* between the two providing that the stevedore should be responsible for any and all damage or injury while loading the vessel. Halcyon leans heavily upon the *Porello* decision but the important thing to be noted is that at the point where the Court makes the statement "Comparative negligence is not unknown to our maritime law" it is discussing the possible intentions which may have been in the minds of the parties when they adopted the language in the contract being considered. Of course comparative negligence is not unknown to the maritime law and of course it may have been the intention of the parties in making the contract which was under consideration in the *Porello* case to adopt comparative negligence. It is non sequitur to argue from this that this Court was thus approving a rule of comparative negligence as between tort feasors where no contractual agreement was involved.

All prior decisions on the subject negative any such inference. Early American cases divided on whether a libellant should be permitted to recover at all for personal injuries in a case where the libellant had been guilty of contributory negligence, even though there was clear fault on the part of the respondent.

Compare

Peterson v. The Chandos, 4 F. 645;
Holmes v. Oregon & California Ry. Co., 5 F. 523;
The Manhasset, 19 F. 430;

with

The Explorer, 20 F. 135;
The Wanderer, 20 F. 140.

The equal division rule of *The Explorer* and *The Wanderer* was consistently applied by lower courts for a number of years and in 1890 the Supreme Court approved it by its decision in *The Max Morris*, 137 U. S. 1.

In the last cited case the petitioner made exactly the same argument which Halcyon makes here. It contended that in a case of personal injury contributory negligence should be a bar and that the rule calling for division of damages where both plaintiff and defendant were negligent *applied only in cases of collision* between vessels. The Supreme Court rejected that argument.

After the decision in *The Max Morris, supra,* a long line of cases approved the rule of division. *The Frank and Willie,* 45 F. 494, *John A. Roebling's Sons Co. of New York v. Erickson,* 261 F. 986, *Storgard v. France & Canada S. S. Corporation,* 263 F. 545, *The Henry S. Grove,* 22 F. 2nd 444 and *The Arizona v. Anelich,* 298 U. S. 110.

In *Socony-Vacuum Oil Co. v. Smith,* 305 U. S. 424, the Supreme Court was considering a case brought *under the Jones Act,* 46 U. S. C. A. 688. The defense there was assumption of risk and in its decision this Court demonstrates that assumption of risk is but one phase of contributory negligence. The discussion in the *Smith* case makes it abundantly plain that the Court was following the congressional mandate to apportion damages between plaintiff and defendant in a Jones Act suit. When it discussed apportionment of the loss, it was following the maritime doctrine applied in cases where the Court was called upon to divide the loss in some manner as between plaintiff and defendant. Rightly understood, nothing in the *Smith* decision can be taken as support for the argument that the rule of proportionate distribution of loss was to be applied in maritime cases as between two tort feasors whose actions had combined to cause injury to the plaintiff.

Stokes v. United States, 144 F. 2nd 82, is explained on the same ground. The Court there had before it an employee-employer situation where the loss had to be apportioned between a plaintiff and a defendant and not between two defendants in an action for contribution.

Earlier in this brief we cited *Portel v. United States,* as the sole authority supporting an award in an action for

contribution upon the basis of proportion rather than a basis of division. To reach that result, the Court in the *Portel* case relied upon the language of this Court in the *Porello* decision, *supra*. It failed to note the distinctions we have made and it failed to consider that where the *Porello* decision mentions comparative negligence it does so with reference to possible interpretations of a contract.

> ". . . we do not believe that the last alternative (division of loss in proportion to fault), which provides for a measure of comparative negligence, is *necessarily beyond the intent of the parties.*" (Emphasis ours.) *American Stevedores v. Porello*, 330 U. S. 446 at 458.

This Court was not, we submit, laying down nor attempting to lay down any rule to be applied in cases arising under the general maritime law where no interpretation of a contract is involved. What parties may intend by a contract of indemnity entered into between them has a number of possible interpretations but they involve interpretations of the contract and not of the general maritime law. Cf. *American Mut. Liability Ins. Co. v. Matthews*, 182 F. 2nd 322.

Thus it is that a careful examination of the holdings of the cases cited by Halcyon strips the camouflage from the words and phrases which Halcyon has plucked at random and shows that the restricted doctrine of comparative negligence in Admiralty applies in cases dividing damages between plaintiff and defendant. It is not the rule of contribution between tortfeasors.

An Analysis of the Decisional Law on Contribution.

The decided cases under maritime law involving true contribution can be separated into four classes.

1. Two vessels mutually at fault collide and thus damage the cargo owned by a third person.
2. Two vessels mutually at fault collide and cause personal injury to a third person.

3. Cases other than collision where tortfeasors mutually at fault damage cargo owned by a third person.

4. Cases other than collision where tort feasors mutually at fault cause personal injury to a third person.

We would emphasize that our discussion of the rule of divided damages is not by any means a concession that the facts of the present case involve that problem at all. We are too much convinced of the merits of our own petition and our other points for that. Assuming arguendo only that as between Halcyon and Haenn there is any ground for dividing damages at all, the present case clearly comes within the fourth class listed above.

Bearing in mind that, except in the *Portel* case, in every case where *contribution* has been awarded as between tort feasors whose actions combined to cause an injury to a third person, the share of the contributors have been equal, we proceed to a discussion of the decisions.

Halcyon concedes (brief 17) that in cases of collision the rule is equal division of damages. We assume that it concedes that equal division is the rule in Class 1 above. If it does not *The Chattahoochee, supra,* foreclose any argument to the contrary.

By its restricted concession Halcyon is apparently attempting to avoid the analogy between the present case and Class 2 above. It is submitted that in personal injury cases arising from collision due to mutual fault, the damages are divided equally. *The Washington,* 76 U. S. 513.

In our Class 3 a review of the cases again finds that the Courts apply the rule of equal contribution. It has been decided many times that where the carrying vessel acts as bailee for the cargo and sues a third party, the rule of half damages applies where cargo damage results from mutual fault other than by collision. *Mason v. The William Murtaugh,* 3 F. 404, *The Bordentown,* 16 F. 270, *The Reba,* 22

F. 546. See also the cases cited in *The Max Morris, supra,* 137 U. S. at 32.

We have already said that the present case falls into our group 4. The rule of equal division has been consistently applied in these cases as well. The decisions by the District Court in *American Mut. Liability Ins. Co. v. Matthews,* 87 F. Supp. 854, reversed on other grounds, 182 F. 2nd 322; *New York & Porto Rico S. S. Co. v. Lee's Lighters,* 48 F. 2nd 372, *The Tampico,* 45 F. Supp. 174 at 176, and *The Samovar,* 72 F. Supp. 574 at 589, apply the equal division rule in cases of personal injury. They specifically recognize the distinction to be drawn where the question is division of a loss as between plaintiff versus defendant and a suit for contribution by one tort feasor against the other.

Thus American Admiralty has a clear rule in cases of contribution between tortfeasors. Some courts have failed to see the distinction between apportionment of fault between plaintiff and defendant and contribution between tortfeasors and Halcyon would perpetuate this error.

This Court's decision in *Phoenix Ins. Co. v. The Atlas,* 93 U. S. 302, recognized the rule to be that the innocent cargo owner could recover his full damages against one vessel if he sued but one vessel. The decisions specifically recognize equal division of the loss where both vessels were before the Court at the suit of the cargo owner or where the first vessel, having paid the loss, sues the other.

A rule of proportionate damage and comparative negligence may be desirable in contribution cases but the rule of proportionate damage cannot be made to work properly without legislative changes applying uniform rules of proportionate damage and changing some of our fundamental concepts of tort law. Legislative policy indicates the intention of Congress to reject apportionment as the maritime rule of contribution. Otherwise it would long since have adopted the Brussels Convention.

Our statement that a rule of proportionate damages and comparative negligence cannot be superimposed upon our system may best be illustrated by an example.

P is injured due to the concurrent or "joint" negligence of D1 and D2. P sues D1 and because of inability to obtain service, D2 is not brought upon the record. D1 defends on the ground that P's injury was due to a combination of contributory negligence by P and the negligence of D2. The jury finds P guilty of contributory negligence and D1 guilty of negligence. It assesses the degree of P's contributory negligence at 20% of the total. It finds that as to the balance D1 contributed one-fourth and D2 three-fourths. It finds that P's total damages amounted to $10,000.00. What amount is P entitled to collect from D1 and what rights, if any, does D1 have against D2?

The concept that P should be entitled to collect the entire sum of his damages from D1 is part and parcel of our common law system in which comparative negligence has no place. If this common law rule is applied, then the true comparative negligence and apportionment of damages theory has been misapplied if P is permitted to collect his $8,000.00 from D1. This is so because as between P and D1, each has been negligent and contributed to the loss in the same degree (i.e., one-quarter of the 80% not attributable to P). Under a system of true comparative negligence D1 should pay but $2,000.00.

The result which would occur today under our confused concepts would be that P would collect his entire judgment of $8,000.00 against D1. That does not conform to basic theories of comparative negligence nor rudimentary principles of justice if the negligence of the actors is to be compared at all. Comparative negligence is thus made to serve only P. It preserves his right which would be defeated *by contributory negligence* under the common law. As between D1 and D2, the remnants of common law reasoning apply so as to deprive them of the benefits of comparative negligence. They should be granted some quid pro quo

if they are deprived of the common law defense of contributory negligence. D1 loses both his penny and his cake.

Just as years ago Pennsylvania and some other states [12] attempted to administer equity through the common law forms and found it so unsatisfactory that legislation was eventually necessary, so an attempt to administer comparative negligence and apportionment of damages through forms having their origin in the common law is unsatisfactory. If any such system is to be adopted it requires legislative overhauling of the entire process. It cannot be done satisfactorily by judicial decision which can deal with but one set of circumstances in a particular case. Such decisions frequently leave courts in a dilemma when the next case comes before them and the facts are slightly different to the point where the rule last announced, which seemed good at the time, will not work substantial justice.

Assuming Arguendo That the Maritime Law Is Not Division of Damages, Still the Moulding of the Verdict Was Proper.

Halcyon urges that it was error for the District Judge to mold the verdict, arguing that it was an abuse of discretion (brief, 17) for the District Court to substitute its own views for those of the jury. Halcyon would deny the right of the Trial Court to exercise any discretion at all on the subject.

To us the District Court's Opinion clearly indicates that what molding was done was because the court was "constrained" to exercise a "conscientious discretion" and to bring the verdict in line with "The usual rule in Admiralty", which "in the absence of contract, is equal contribution between joint tort feasors" (R. 179).

If the usual rule is the proper rule, as we here contend, then molding of the verdict was proper. Even if the usual rule is not the proper rule, the action of the Trial

12. Bispham; Principles of Equity (10th Ed.) p. 27.

Judge was within his discretion and cannot be set aside by this Court unless there are *no* grounds to support it.

We take it that substantive rights are not dissipated by the choice of a common law forum in a case which, except for 28 U. S. C. A. 1331 (1), would have been heard in Admiralty. Rules of the Maritime Law govern no matter what the forum. *Garrett v. Moore-McCormack Lines, supra.*

The cases cited by the Court below amply demonstrate the rule that the "conscientious discretion" of the Trial Judge may "give or withhold damages" in admiralty. There is no reason why that principle should not apply in a suit for contribution which is likewise based upon Admiralty and Maritime Law.

In *Socony-Vacuum Oil Co. v. Smith,* 305 U. S. 424 at 432, this Court said:

> "*The power of the trial judge* to guide and instruct the jury *and his control over* excessive *verdicts* afford as adequate protection to owners as in any other case . . .". (Emphasis ours.)

We take this language as ample supporting authority for the action of the Trial Judge in molding the verdict. True it is that we regard it as an unnecessary argument for the reason that we think this Court should never have to reach it in our case. Nevertheless, we suggest that, no matter which ground motivated the District Judge, his action was proper. He had the right and the duty to mold any verdict he considered improper. Since the case was based upon principles of maritime law, his "exercise of conscientious discretion" was a right which Haenn was entitled to have enforced [13] in its favor once the judicial conscience was aroused.

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13. Opinion of District Judge McGranery, R. 225.

CONCLUSION.

We respectfully submit that Halcyon's petition raises points which should not be reached. If they are, then we ask this Court to consider the problems and resolve them so as to furnish guidance for lower courts which are today sailing upon seas of dispute and doubt.

Respectfully submitted,

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